

Claimant disputes the nature and extent of her injury, arguing entitlement to a work disability based upon a loss of tasks and a loss of wage earnings. Respondent contends the Award, as far as the nature and extent, should be affirmed and claimant awarded a 4 percent whole body impairment on a functional basis.

Respondent, however, argues that claimant failed to provide timely written claim and, therefore, all benefits should be denied.

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the Administrative Law Judge should be affirmed.

The Award sets out findings and conclusions which are adopted by the Board as though set forth herein.

Claimant began working for respondent as a packer in July of 1996. In September of 1996, while working on a paper jam, she climbed onto the top rail of a machine and, as she was attempting to release the jam, slipped and fell, landing on her bottom. Claimant testified she felt immediate pain in her neck, tailbone and back, reporting this to her supervisor.

Claimant was eventually referred to Occumed Clinic at the Freeman Hospitals for treatment. She came under the treatment of M. Parks, D.O., whom she saw on several occasions. While under treatment with Dr. Parks, claimant was provided workers' compensation treatment forms, which discussed claimant's condition and her ongoing treatment. The forms also questioned whether claimant was capable of returning to work and, if so, with what restrictions, as well as claimant's need for additional treatment. Claimant brought several of these forms back to respondent, presenting them to respondent's secretary in October of 1996. Claimant testified her intention, when providing these documents to respondent, was to obtain ongoing workers' compensation benefits of medical treatment.

Claimant was released by Dr. Parks in December of 1996, with no restrictions. Claimant testified that even though she was released, she was having ongoing problems, including neck pain and pain in her thoracic and lumbar spine, as well as pain in the right shoulder. Claimant also testified to ongoing headaches.

Claimant worked through March 12, 1997, after which claimant's employment was terminated. Claimant alleged she quit because she could not physically handle the job responsibilities. Respondent's representative Albert Porter, the environmental services manager, testified that claimant was terminated after she walked off the job. Claimant last worked on March 12, 1997. On March 15, 1997, claimant called in sick. Claimant also called in sick on March 16, 1997, with someone named Don calling claimant in sick on March 17 and 18, 1997. Claimant was scheduled to work March 23, 24, 25 and 26, but neither called in nor showed up for work on those dates. Claimant was terminated on March 27, for job abandonment.

After leaving respondent's employment, claimant obtained employment with Steamatic in approximately April of 1997, doing fire and water restorations. Claimant worked that job for between two and three months, leaving the job in July of 1997. In August of 1997, she moved to Chelsea, Oklahoma, where she obtained employment with the VA Hospital as a nurse's aide. At the Steamatic job, she was making \$6.50 an hour, but only averaging approximately 2 hours per day. At the VA Hospital, claimant was making \$5.15 an hour and working 40 hours a week. Claimant alleged she was physically unable to do the VA Hospital job, but continued working at the VA Hospital through October of 1997. She then immediately went to work for Samco, making \$6.70 an hour and working 40 hours per week as a machine operator. Claimant later alleged she was unable to perform that job, but continued working there until April of 1998. Since leaving Samco in April of 1998, claimant has not looked for work nor has she been employed in any capacity.

Claimant was examined by orthopedic surgeon Mark A. Hayes, M.D., in Tulsa, Oklahoma, at respondent's request. Claimant was examined first on July 9, 1998, and again on August 31, 1998. She was diagnosed with a fracture at the T7 level, for which he recommended physical therapy. When he released claimant, he placed no restrictions on her ability to work, but acknowledged that if she wanted to self limit, that would be her choice. He found no objective findings which required treatment from an orthopedic standpoint. As of August 31, 1998, Dr. Hays felt claimant was able to return to work and had no further treatment recommendations for her.

Claimant was referred to Edward J. Prostic, M.D., board certified orthopedic surgeon, by her attorney. Dr. Prostic examined claimant on September 8, 2000, at which time he diagnosed tenderness at the right greater trochanter and at the right shoulder, with complaints of pain with testing. He felt claimant had sustained a compression fracture of T10, as well as strains and sprains of her neck and low back. He assessed claimant a 12 percent impairment to the body as a whole on a functional basis, utilizing the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). In reviewing the task list prepared by vocational expert Karen Crist Terrill, he found claimant incapable of performing five of sixty-two non-duplicative tasks, for an 8 percent loss. There was one additional task which claimant indicated required lifting of 20 to 45 pounds. When Dr. Prostic was advised that claimant regularly lifted only 5 pounds on that job, he testified that that would be within her physical abilities. This would indicate a loss of four of sixty-two tasks, for a 6 percent task loss, although Dr. Prostic did not testify to that number.

Dr. Prostic did not impose any restrictions on claimant at the time of the September 2000 examination. However, when his deposition was taken on September 30, 2002, he was asked to place restrictions on claimant. He testified, at that time, that she should not lift weights greater than 35 pounds occasionally and 15 pounds frequently and she should avoid frequent bending or twisting at the waist, forceful pushing or pulling, and more than minimal use of vibratory equipment or captive positioning.

As a result of the dispute between the examining physicians, claimant was referred by the Administrative Law Judge for an independent medical examination to board certified orthopedic surgeon Theodore L. Sandow, Jr., M.D., on May 9, 2001. Dr. Sandow diagnosed a mild compression fracture of T7, which he felt had healed satisfactorily, although there were degenerative changes present at that level. X-rays of the cervical, thoracic and lumbar spine were obtained, with the cervical x-rays showing a normal curvature and well-maintained disc spaces. The thoracic spine showed the mild wedging at T7, with the lumbar x-rays demonstrating mild degenerative changes, although the disc spaces appeared to be fairly well maintained. He indicated in his report that there was symptom magnification, with one to two positive Waddell signs while claimant was being tested, indicating a possible exaggeration of symptoms by claimant. For the T7 fracture, he assessed claimant a 2 percent impairment to the body as a whole, with an additional 1 percent impairment for the persistent pain in the neck and coccyx and an additional 1 percent impairment for headaches. He found claimant to have a total functional impairment of 4 percent to the body as a whole.

In workers' compensation litigation, it is claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.<sup>1</sup> In this instance, the Board finds the most credible opinion to be that of Dr. Sandow, the independent medical examiner. Dr. Hays' determination that claimant had no functional impairment is questionable, considering the positive findings on x-ray in claimant's thoracic spine. Likewise, Dr. Prostic's assessment of a 12 percent impairment to the body as a whole is questioned, as he found a compression fracture at a level entirely different than that found by both Dr. Hays and Dr. Sandow. Additionally, Dr. Prostic showed a somewhat biased attitude when providing restrictions at his deposition at the request of claimant's attorney, a full two years after determining claimant needed no restrictions at the time of the examination. The Board finds the most credible opinion in the record to be that of Dr. Sandow and awards claimant a 4 percent impairment to the body as a whole on a functional basis.

The Board must also consider whether claimant provided timely written claim. K.S.A. 44-520a (Furse 1993) requires that written claim be submitted within 200 days of the accident or within 200 days of the last treatment provided.

The Administrative Law Judge determined that claimant satisfied the written claim statute by applying *Blake*<sup>2</sup> and *Shields*.<sup>3</sup> *Blake* and *Shields* hold that the employer has an

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<sup>1</sup> K.S.A. 1996 Supp. 44-501 and K.S.A. 1996 Supp. 44-508(g).

<sup>2</sup> *Blake v. Hutchinson Manufacturing Co.*, 213 Kan. 511, 516 P.2d 1008 (1973).

<sup>3</sup> *Shields v. J. E. Dunn Constr. Co.*, 24 Kan. App. 2d 382, 946 P.2d 94 (1997).

affirmative duty to notify a worker, once medical treatment is no longer deemed authorized, before the written claim time will begin to run. *Blake* and *Shields* can be easily distinguished from this case. First, claimant was under the treatment of Dr. Parks until December of 1996, at which time claimant was returned to work without restrictions and with no indication of any ongoing treatment. Additionally, claimant testified that after being released by Dr. Parks, her pain continued and that she went to respondent (in particular, her supervisor, identified as Clayton) and requested that she be returned to the doctor. This request was refused. It would appear rather obvious that claimant was notified that ongoing medical treatment for her September 28, 1996 accidental injury had ceased and that additional treatment was not authorized.

The Supreme Court has stated that the purpose of written claim is to enable the employer to know about the injury in time to investigate it.<sup>4</sup> The same purpose or function has been ascribed to the requirement for notice found in K.S.A. 44-520.<sup>5</sup> Written claim is, however, one step beyond notice in that an intent to ask the employer to pay compensation is required. In *Fitzwater*,<sup>6</sup> the Kansas Supreme Court described the test as follows:

In determining whether or not a written instrument is in fact a claim the court will examine the writing itself and all the surrounding facts and circumstances, and after considering all these things, place a reasonable interpretation upon them to determine what the parties had in mind. The question is, did the employee have in mind compensation for his injury when the instrument was signed by him or on his behalf, and did he intend by it to ask his employer to pay compensation?

Claimant described two separate documents which she alleges satisfied the written claim requirements. The first set of documents, which were identified as Deposition Exhibits 3 and 4,<sup>7</sup> are consent forms to Freeman Hospitals and Health System for particular drug screen and other tests to be performed on claimant. Respondent was identified as the company and claimant did sign that particular document. However, there was testimony from Mr. Porter that those documents were never in claimant's file and, to his knowledge, were never presented to respondent at any time. Absent evidence to the contrary, the Board cannot find written claim was satisfied by those documents, as there is no indication they were ever actually presented to respondent.

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<sup>4</sup> *Craig v. Electrolux Corporation*, 212 Kan. 75, 510 P.2d 138 (1973).

<sup>5</sup> *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

<sup>6</sup> *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 309 P.2d 681 (1957).

<sup>7</sup> Continuation of R.H. Trans., Ex. 3 and 4.

The second set of documents, identified as Deposition Exhibits 3-A, 4-A and 5,<sup>8</sup> consist of several workers' compensation treatment forms which were created by Dr. Parks and presented to claimant. Claimant brought those documents to respondent, submitting them to respondent for the purpose of obtaining ongoing medical care. The documents do indicate the problems for which claimant was being treated and the recommended additional treatment, as well as any work restrictions which applied at that time.

In considering the applicability of those documents to the written claim statute, the Board considers the Supreme Court's opinion in *Ours*<sup>9</sup> to be on point. In *Ours*, the court stated:

The written claim required by K.S.A. 1972 Supp. 44-520a to be served upon the employer under the Workmen's Compensation Act need not be signed by or for the claimant. The written claim may be presented in any manner and through any person or agency. The claim may be served upon the employer's duly authorized agent.

The Board believes that the purposes of the Kansas Workers Compensation Act and of the written claim statute, in particular, are best served by finding the workers' compensation treatment forms, presented by claimant to respondent's representative for the purpose of obtaining ongoing medical treatment for her workers' compensation injury, satisfy the requirements of K.S.A. 44-520a (Furse 1993) and shall be treated as written claim for the purposes of this litigation.

Therefore, while the Board acknowledges claimant did submit timely written claim, it is on grounds dissimilar to those submitted by the Administrative Law Judge.

The Board must next consider whether claimant is entitled to a work disability in addition to her functional impairment under K.S.A. 1996 Supp. 44-510e, which states as follows:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was

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<sup>8</sup> *Id.*, Ex. 3-A, 4-A and 5.

<sup>9</sup> *Ours v. Lackey*, 213 Kan. 72, Syl. ¶ 4, 515 P.2d 1071 (1973).

earning at the time of the injury and the average weekly wage the worker is earning after the injury.

K.S.A. 1996 Supp. 44-510e goes on to state:

An employee shall not be entitled to receive permanent partial general disability in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

However, this statute must be read in light of the Kansas Court of Appeals' opinions in *Foulk*<sup>10</sup> and *Copeland*.<sup>11</sup> In *Foulk*, the Kansas Court of Appeals found that a claimant cannot refuse work which is within his or her abilities, while remaining home and accepting the benefits of the Workers Compensation Act. A claimant cannot, therefore, refuse a reasonable offer of accommodated work. In this instance, claimant had been provided work by respondent within the restrictions placed upon her. For whatever reasons, claimant elected to terminate her employment with respondent by simply no longer coming to work. As a result, claimant's job was terminated.

A claimant must also put forth a good faith effort to find employment after leaving respondent's employment. The legislature did not intend for a claimant to be rewarded for sitting at home, making no effort to find work and again obtaining the benefits of the Workers Compensation Act.<sup>12</sup>

Claimant, after leaving respondent, worked several different jobs, at times earning more than the wage she was earning at her employment with respondent. There was no indication from any health care provider that claimant was limited to anything other than full-time work or that claimant was incapable physically of performing the job duties for the three employers for whom she was employed after respondent. After leaving Samco, claimant has altogether ceased looking for work. The Board finds that claimant's determination to terminate her employment with respondent and her failure to seek employment after leaving Samco did not constitute a good faith effort to retain or obtain employment. The Board will, therefore, apply the principles set forth in *Foulk* and impute to claimant a wage equal to that she was earning at the time of her termination, which is greater than 90 percent of the wages claimant was earning at the time of her injury. Claimant is, therefore, limited, under K.S.A. 1996 Supp. 44-510e, to her functional

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<sup>10</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

<sup>11</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

<sup>12</sup> *Id.*

impairment of 4 percent to the body as a whole and the Award of the Administrative Law Judge in that regard is affirmed. The Board, therefore, affirms the Award of the Administrative Law Judge, although the Board's determination with regard to whether claimant submitted timely written claim is based upon grounds different than that found by the Administrative Law Judge.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Jon L. Frobish dated October 13, 2003, should be, and is hereby, affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of March 2004.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: William L. Phalen, Attorney for Claimant  
Clifford K. Stubbs, Attorney for Respondent  
Jon L. Frobish, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director